United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1027

To be argued by
BART M. SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1027

UNITED STATES OF AMERICA,

Appellee,

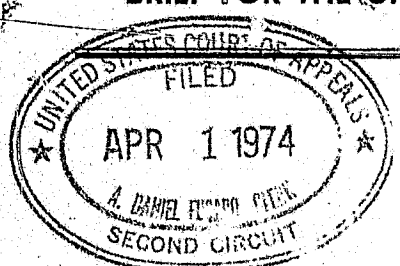
—v.—

MILTON PARNESS and BARBARA PARNESS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

BART M. SCHWARTZ,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BART M. SCHWARTZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the ~~XXX~~ 1st day of April, 1974 he served ~~a~~ two copies ~~copy~~ of the within brief (U.S.v. Parness 74-1027) by placing the same in a properly postpaid franked envelope addressed:

Roy M. Cohn, Esq.
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And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop~~ for mailing opposite the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Bart M. Schwartz

Sworn to before me this

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TABLE OF CONTENTS

PAGE

TABLE OF CASES

Table of Statutory Authority

Table of Other Authorities

United States Court of Appeals

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Milton Parness and Barbara Parness * appeal from judgments of conviction entered on December 7, 1973, in the United States District Court for the Southern District of New York after a two and a one-half week trial before the Honorable Dudley B. Bonsal, United States District Court Judge, and a jury.

Indictment 73 Cr. 750 filed on August 2, 1973, superseding Indictment 73 Cr. 157, in seven counts charged Milton Parness in Counts One, Two and Three with acquiring control of three separate enterprises through a

* Milton Parness will be referred to as Parness. Barbara Parness will be referred to as Barbara Landew, her name at the time of the acts charged in the Indictment and before her marriage to Milton Parness.

pattern of racketeering in violation of Title 18, United States Code, Sections 1961, 1962(b), 1963 and 2. Counts Four through Seven charged both defendants with four violations of Title 18, United States Code, Sections 2314 and 2 which crimes constituted the individual acts of racketeering forming the pattern of racketeering charged in Counts One through Three.* At the end of the Government's case-in-chief Counts Two, Three and Seven were dismissed. Parness was convicted on Counts One, Four, Five and Six. Landew was convicted on Counts Four, Five and Six. On December 7, 1973, Judge Bonsal sentenced Parness to a ten year term of imprisonment on each count to run concurrently. Parness was also sentenced to a $25,000 committed fine on Count One and $10,000 committed fines on each of Counts Four, Five and Six. Landew was sentenced to a term of imprisonment of two years on Counts Four, Five and Six to run concurrently. Execution of sentence was suspended and she was placed on 3 years probation. Landew was also fined $2,000 on each count. Parness is enlarged on bail pending appeal.

Statement of Facts

The Government's Case

A. Synopsis

The proof at trial established that Milton Parness and Barbara Landew defrauded Alan Goberman of his 90.5% stock holdings in a multi-million dollar gambling casino-hotel corporation—the St. Maarten Isle Hotel Corporation, N.V., (hereinafter "Hotel Corp.") in the Netherlands Antilles. Defendants accomplished this by illegally diverting

* The allegations of Counts Four through Seven were set forth in paragraphs 3(h)(i)(j) and (l) of Count 1, respectively. Another act of racketeering—extortion—was set forth in paragraph 3(m). The indictment charged these crimes as forming the pattern of racketeering described by Section 1962(b).

to their own use a part of Hotel Corp.'s receipts and using these stolen receipts to loan Goberman $160,000 for which Goberman pledged his entire stock interest. Thereafter, by continuing to divert or withhold part of Hotel Corp.'s receipts and by effectively preventing Goberman from obtaining the necessary funds, they made it impossible for Goberman to repay the loan, thus permitting Parness to foreclose on the shares and take control of Hotel Corp. Parness attempted to sell the shares in Canada through a series of corporate transfers and a public stock offering. Canadian authorities learned of a forged certification on the balance sheets contained in the prospectus filed in Canada and the public stock offering never took place. Thereafter Parness and Landew actively interfered with the Government's investigation of this case.

B. Goberman's Financial Problems

In 1967 Alan Goberman, a successful Pennsylvania construction man, heard about the St. Maarten Isle Hotel Corporation, N.V.—Hotel Corp.—which owned an insolvent and partially completed hotel and gambling casino on St. Maarten, Netherlands Antilles (Tr. 3-5).* Goberman formed the Goberman Construction Company, N.V. and with funds borrowed from the Antillean Government (approximately 3 million) and American sources (approximately 2 million), completed construction of the hotel-casino in January, 1970 (Tr. 7, 28-29). When the hotel-casino opened Goberman owned 90.5 per cent of the stock of Hotel Corp. and was in possession of a 3.5 million dollar demand note from Hotel Corp. representing money which Goberman had loaned to Hotel Corp. for construction (Tr. 35; GX 3).**

The hotel-casino opened in early 1970 and was moderately successful for a time. The primary business of Hotel Corp. came from gambling junkets originating in the United States whose gamblers patronized the casino and gambled

* References to the trial transcript are preceded by "Tr."
** Government exhibits are identified by "GX".

in cash and on credit.* Although not planned as the major source of income, it soon became apparent that Hotel Corp. could not survive without the American gamblers (Tr. 20-21).

At the time Goberman took over the Hotel Corp. he had no experience in operating a casino and hired Fred Ferrara to run it for him (Tr. 13, 20). It was through Ferrara that Goberman met Parness in the late summer or early fall of 1970 (Tr. 22). When Goberman decided to replace Ferrara he turned to Milton Parness who had been sending junkets to the casino through the Olympic Sports Club, Inc. (hereinafter "Olympic") (Tr. 24-25).** In late 1970 Goberman offered and Parness accepted *exclusive* control over all junkets coming to the casino and *exclusive* re-

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* Gambling junkets were comprised of individuals who were flown to the Netherlands Antilles and provided with accommodations at the hotel both free of charge. (Spouses of gamblers had to pay air fare). The individual gamblers put up gambling money for the hotel-casino prior to departure and this money was credited to the gambler when he lost at the casino. Gambling losses in excess of the front money were on credit (Tr. 17). When credit was extended, the player signed a marker or I.O.U. If a player failed to win and redeem the marker, he returned to the United States with the marker outstanding. The junketeer who organized the junket was then responsible for collecting the markers in the United States and remitting the cash to the Hotel Corp. The junketeer, after deducting his own cost of the gambler's air fare and a 10 per cent commission, would send the money to the Hotel Corp. (later to Parness).

** Olympic Sports Club, Inc., was a New Jersey corporation owned by Milton Parness which was activated in 1970 by Parness and Barbara Landew. Parness concealed his participation in this company by using the name "Edward Feldman" on Olympic corporate documents and checks (Tr. 592-601-603, 609, 610). When initially interviewed by Department of Justice investigators in 1972, the real Edward Feldman expressed surprise at Milton Parness signing his name. Later, at Parness' request, Edward Feldman changed this story. At trial Feldman testified that his original story—surprise at Parness' actions—was the truth (Tr. 667-680).

sponsibility and control over marker collections in the United States (Tr. 24, 25, 69).

Thereafter all gambling junkets from the United States to Hotel Corp. were arranged through Olympic and Parness. Olympic's sole function and only source of funds during this period was in connection with arranging junkets and the collection and disbursement of junket front money, air fares and marker collections (Tr. 595, 598-600; GX 155).

Shortly after the hotel-casino's opening financial difficulties arose. Goberman attempted to refinance in order to get working capital to pay the Hotel's Corp.'s bills (Tr. 33). These efforts were unsuccessful until October 6, 1970, when Leonard Holzer of New York City, a mortgage lender, loaned Goberman $150,000 on a short term basis (Tr. 42; GX 19-21). As collateral Goberman signed a $150,000 promissory note secured by a pledge of his entire stock interest (226,500 shares) in Hotel Corp. Milton Parness was familiar with all the details of the Holzer loan transaction (Tr. 71-73). Virtually the entire $150,000 was advanced by Goberman to the Hotel Corp. (Tr. 48-53).

In late 1970 Holzer began pressuring Goberman for repayment. Goberman was unable to get the money from Hotel Corp. or from Parness (Tr. 74-75). Finally, the Holzer loan was called. Goberman repeatedly asked Parness for money from the approximately $400,000 in marker collections that Goberman calculated to be due from American gamblers (Tr. 70, 74, 80-81). Parness said that collections were slow but that he would collect the money and he assured Goberman that there was nothing to worry about (Tr. 74-75, 80-81).*

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* It was during this period of time that the Internal Revenue Service seized $60,000 from a gambler named Norber who was bringing the money to Parness to pay his markers (Tr. 530-33).

On January 25, 1971, Holzer informed Goberman that a lawsuit had been instituted to foreclose on Goberman's shares in Hotel Corp., and that the shares were to be disposed of at a public sale on February 4, 1971 (Tr. 76-77, 81). Parness went with Goberman to see Holzer to try to delay the foreclosure but Holzer refused (Tr. 80).

Parness retained William D. Hamilton, Esq., to represent Goberman in the Holzer lawsuit (Tr. 99-100). At this juncture Parness told Goberman that he could not get money for Goberman from marker collections but he was able to borrow $150,000 to advance to Goberman to pay Holzer (Tr. 81, 85-86). Parness said that as part of the arrangement the lenders wanted Goberman to again pledge his entire stock interest in the Hotel Corp. Goberman testified that his calculations showed that about $400,000 in markers was due to Hotel Corp. at that time (Tr. 70, 460-63).*

Hamilton obtained a one week adjournment from Holzer's attorney (Larry Faigin, Esq., of Willkie, Farr and Gallagher) on Holzer's summary judgment motion on the Goberman note (Tr. 713-717). Shortly thereafter, at Parness' direction, Hamilton prepared a loan agreement between two nominees of Parness, Barbara Landew and Stanley Amsterdam, as lenders and Goberman as borrower of $160,000 ($150,000 plus accrued interest and Holzer's attorney's fee) (Tr. 86, 719; GX 38).** It now remained to get the $160,00 to Holzer.

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* Goberman also testified that about 10% of the $400,000 was probably uncollectible based on prior experience at the casino (Tr. 462-63, 467).

** Stanley Amsterdam was the husband of Landew's partner in a travel agency. He testified that he had no real interest in the hotel and never loaned money to Goberman (Tr. 795-96). He signed the loan agreement at Parness' request (Tr. 796).

On February 4, 1971, Landew went to the National Newark and Essex Bank in West Orange, New Jersey with $99,000 in cash in small denominations and a $56,000 check drawn on Olympic's bank account.* Landew purchased two cashier's checks in the amounts of $150,000 and $5,000, to pay principal and interest respectively on the Holzer loan (Tr. 701-705; GX 41). The cashier's checks made payable to Holzer's attorneys were left at the bank to be picked up later that day.

While Landew was obtaining the cashier's checks in New Jersey, Parness arranged for Goberman and his attorney Hamilton to meet Holzer's attorney Faigin to go to the bank in West Orange to pick up the checks (Tr. 92-94, 714, 725). They all drove to New Jersey without Parness, obtained the two checks and returned to New York.** On February 9, 1971, an additional check for $5,000 drawn on the Olympic account by Landew was used to purchase a $5,000 cashier's check payable to Willkie, Farr and Gallagher for Holzer's legal fees (Tr. 706; GX 45, 46).***

The books and records of Olympic reflected substantial marker collections during the first three months of 1971 (Tr. 749-56, 779-80, 781-89, 813; GX 155). The $56,000 and $5,000 checks used to purchase the cashier's checks in New Jersey were falsely recorded in Olympic's books at Parness' direction as payments for travel and transportation (Tr. 811-812, 851, 854).****

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* Landew was accompanied by Barbara Goldman, a business associate. Goldman did not know the exact purpose of the trip but was told that the money was to be used in connection with taking over the hotel and casino (Tr. 621).

** The interstate transportation by Goberman, and of the checks purchased with stolen funds form the basis of Counts Four and Five of the indictment.

*** The interstate transportation of this third check, representing money stolen from Hotel Corp. is the basis for Count Six.

**** After the Government commenced the investigation in this case, Milton Parness advised his accountant that the $56,000 travel and transportation was really a loan to Goberman (Tr. 830-32). Parness later described the $56,000 to his accountant as a "redeposit" of funds and not air fare (Tr. 833).

During February and March, Goberman unsuccessfully attempted to get funds from Parness and the Hotel Corp. with which to repay the purported lenders, Landew and Amsterdam, and redeem his pledged stock (Tr. 100-103). At about this time Parness hired Faigin (formerly Holzer's attorney) to foreclose on the Goberman loan and draft the appropriate papers. All the parties involved gathered in St. Maarten between March 31 and April 4, 1971, to carry out this objective (Tr. 108-110).

On or about April 3, 1971, Faigin drafted seven letters (GX 77-83) bearing various dates which formally divested Goberman of his 226,500 shares of stock in Hotel Corp. and had the letters executed by Goberman and Landew and Amsterdam. The letters were as follows: (1) a letter from Barbara Landew and Stanley Amsterdam to Goberman dated March 14, 1971, demanding payment of the $150,000 loan within three days; (2) a letter from Barbara Landew and Stanley Amsterdam dated March 18, 1972, giving notice of their intention to retain the pledge of Goberman's stock for his failure to repay the loan; (3) a letter from Landew and Amsterdam dated March 19, 1971, to the Managing Director of Hotel Corp. instructing him to transfer Goberman's stock to Landew and Amsterdam on the corporate stock ledger; (4) a letter from Goberman to Landew and Stanley Amsterdam dated April 2, 1971, surrendering his pledge of stock because of his inability to repay the loan; (5) a letter from Goberman to Hotel Corp. dated April 3, 1971, concerning the location of the stock certificates which were said to have been lost; and (6) (7) two letters from Goberman, as Managing Director of Hotel Corp., to Landew and Amsterdam dated April 3, 1971, advising them of the transfer to each of 113,250 shares of Hotel Corp. stock.

Now that he had formal control of Hotel Corp., Parness and a business associate Klavir, correctly reasoned that Hotel Corp. must have become indebted to Goberman for the money Goberman advanced for construction (Tr. 35).

Therefore, Parness set out to get control of this indebtedness. In June, 1971, Parness and Klavir presented Goberman with a letter backdated to March 17, 1969, for Goberman's signature (Tr. 132-135; GX 85). The letter purported to be from Goberman to The Development Co., Limited and recited an agreement whereby Goberman would transfer 3.0 million dollars in bearer notes of Hotel Corp. to Development Co. Ltd. as of March 17, 1969, in exchange for 245,000 shares of stock of Global Electronics, Inc. At the time of the signing of the letter in 1971 Global was an inactive Utah mining corporation whose stock was worthless (Tr. 578-90).* The notes were also prepared for Goberman's signature (GX 84). Goberman, who had heard a conversation between Klavir and Parness about how they were going to take Goberman's remaining promissory notes and set up a phoney stock offering with Hotel Corp.'s stock in Canada, refused to sign the letter or the notes (Tr. 135-137). Parness told Goberman that he would be found floating in the river if he continued to refuse (Tr. 143-144). Goberman thereupon gave in to Parness' request.**

C. Corporate Transfers And The Fraudulent Canadian Offering

In the spring of 1971, after acquiring the stock of the Hotel Corp., Parness bought all the stock of an Antillean shell corporation Aliter Holdings, N.V., through his cousin Edward Levrey, whom he had employed as manager of Hotel Corp. (Tr. 1405, 1410-11; GX 100-102, 123).*** Par-

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* Bernard Klavir had discussed Global Electronics with its registered representative in 1969 (Tr. 589-590).

** This act of extortion by Parness, in violation of 18 U.S.C. § 1951, is alleged in the indictment as an act of racketeering which supports the charges in Count One. The extortion was not alleged as a substantive crime because of lack of venue in the Southern District of New York.

*** Parness offered a job to his cousin Levrey in the summer of 1970 (Tr. 1391). On February 1, 1971, before Parness had even arranged for the "loan" to Goberman, Parness offered Levrey the managing director's job at Hotel Corp. (Tr. 1392).

ness appointed Levrey as nominal managing director of Aliter (Tr. 1410). On June 10, 1971, Landew and Amsterdam transferred their nominal holdings in Hotel Corp. to Aliter through letters prepared by Faigin (GX 115). On June 14, 1971, Aliter, through Levrey, acknowledged receipt of the 226,500 shares of Hotel Corp. (Tr. 1416-18; GX 118). This June 14, 1971, letter, the substance of which was unfamiliar to Levrey, falsely stated that Landew and Amsterdam acted as Aliter's agents in their dealings with Goberman, and that Aliter provided all funds for Landew and Amsterdam (Tr. 1416-18). On June 19, 1971, Goberman signed a letter, prepared by Faigin, to Aliter acknowledging the assignment of the Hotel Corp. stock, and advising it that Aliter had been placed in the stock register of Hotel Corp. as the record owner of the 226,500 shares (GX 121). On July 2, 1971, at an extraordinary meeting of the shareholders of Hotel Corp., Edward Levrey, voting Goberman's former shares, formally replaced Goberman as managing director of Hotel Corp. (Tr. 1413; GX 129). Levrey then became the licensed operator of the casino, and Goberman's divorce from any interest in Hotel Corp., long since a reality, became technically complete.

On May 19, 1971, Parness bought another Antillean corporation, Terrasol Holdings, N.V., through Levrey (GX 100-101) and made Levrey managing director (Tr. 1419).* On August 20, 1971, Terrasol received Goberman's 90.5% stock interest in Hotel Corp. from Aliter, and $2,500,000 in Hotel Corp. bearer notes in exchange for common stock of Terrasol (Tr. 1421; GX 135). Throughout these dealings in Aliter and Terrasol Levrey did not put up any money. He believed he was Milton Parness' partner in the hotel-casino business.

On November 11, 1971, Terasol filed a prospectus with the Quebec Securities Commission in an effort to sell about

* Parness also sold 5,000 shares to Amsterdam for $5,000 in October, 1971 (Tr. 801).

20% of the outstanding Terrasol common stock (GX 150). The prospectus described Aliter as a Levrey family corporation and identified certain officers who turned out to be hotel employees. It represented that Terrasol had two assets: the 226,500 shares of Hotel Corp., which were said to have been acquired by Levrey from Goberman for $160,000, and the $2.5 million in Hotel Corp. notes, which Terrasol was also said to have acquired from Levrey. Subsequently, on February 4, 1972, Bernard Klinger, an accountant who had given a certified statement to Hotel Corp. noticed that his certified statement, in an altered form, had been used without his permission in the Terrasol prospectus * (Tr. 1484-87; GX 141, 150). After discovering the fraudulent statement and contacting Parness, Parness' lawyer Faigin attempted to get Klinger to withdraw his claim. Klinger would not do so. Accordingly, the Quebec Securities Commission was notified and on February 21, 1972, the Commission halted all trading in the securities of Terrasol, and the proposed stock offering collapsed (Tr. 1492).

Finally, the Government introduced a portion of Landew's testimony to a Grand Jury investigating this case. She had falsely testified that she had become the owner of the casino on paper when Levrey asked her and Amsterdam to sign the Goberman loan agreement (Tr. 869). She had also testified that the $150,000 came from Levrey in cash through Milton Parness (Tr. 870). Landew further had testified that it was Levrey who paid the attorney Faigin to prepare the seven letters written in late March and early April, 1971 (Tr. 877). Finally, she had testified that Levrey requested that she write the letter of June 10, 1971, (GX 115) stating that she and Amsterdam had acted as agents for Aliter.

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* The altered statement took the form of a consolidated statement which Klavir had originally asked Klinger to prepare but Klinger had refused.

The Defendants' Cases

John Blandino testified that he was an executive assistant manager at the hotel in 1970 (Tr. 952). The hotel had financial difficulties paying its bills (Tr. 965). Blandino identified a group of original markers in the form used by Hotel Corp. He was not able to testify that all the markers were signed in his presence or that he knew all the gamblers whose markers he identified (Tr. 991, 1001-1008; DX Q-Y).* Blandino testified that during the relevant period Parness sent checks to the hotel and that many times these checks were immediately cashed rather than deposited in the hotel's bank account (Tr. 1036-39, 1041).

Larry Faigin testified concerning his representation of Holzer in the Goberman transaction and the picking up of checks in New Jersey (Tr. 1046, 1073-77, 1082-89). With respect to the seven letters drafted and executed in March-April, 1971, Faigin testified that he discussed these letters with Goberman and Goberman's lawyer, Rubin, who was also present, before they were signed (Tr. 1095-1102). On cross-examination Faigin stated that Parness, through Olympic, was paying Rubin. He testified that in June, 1971, he learned that Aliter had furnished the $160,000 (Tr. 1173), but later retracted the statement (Tr. 1176), and added that Levrey did not put up any money in connection with Aliter and the Goberman loan (Tr. 1178). He further testified that his fees were paid by Parness or through Olympic (Tr. 1139, 1243). Faigin described Levrey as a "front" for Milton Parness (Tr. 1251).**

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* Defendants exhibits are preceded by "D".

** During the time that Goberman was attempting to get money to pay the Landew-Amsterdam loan he was having problems with other creditors. Finally, in February or March, 1971 he filed for bankruptcy (Tr. 106-107). Faigin prepared legal papers and an affidavit for Goberman in connection with the Bankruptcy proceedings which supported a "Landew-Amsterdam" claim to Goberman's stock superior to other creditors (Tr. 1147-1151).

ARGUMENT

POINT I

Count One properly charges a violation of Title 18, United States Code, Section 1962(b).

Parness claims that Count One of the indictment charging him with acquiring an interest in Hotel Corp. through a pattern of racketeering fails to state a criminal offense under Title 18, U.S.C. § 1962(b). He argues that in passing Section 1962(b) Congress provided protection only to domestic enterprises and that despite its affect on American commerce and its ownership by Americans, the Hotel Corp., being a foreign corporation, could not be acquired in violation of the racketeering statute. This claim is without merit.

In the instant case, the indictment under Section 1962 (b) charged a scheme in which an American citizen was defrauded of his interest in a hotel-casino (a) primarily serving American tourists, spending American money; (b) to which Pennsylvania banks and a Boston businessman had loaned approximately two million dollars; and (c) whose accounts payable in the United States were pillaged here by an American through the use of a New Jersey corporation. That Congress could have and in fact did protect such legitimate American interests by the Organized Crime Control Act is clear. *Cf. United States* v. *Frank*, slip op. 1883, 1903 — F.2d — (2d Cir., March 14, 1974).

The purpose of the Organized Crime Control Act of 1970, Title 18, United States Code, Sections 1961 *et seq.*, was to give the public tools equal to the difficult task of combating the sophisticated elements of organized crime

which prey on the citizens,* businesses and economy ** of the United States. See Senate Report No. 91-617, 91st Congress, 1st Sess., pp. 76-80 (1969). Parness' myopic view that Congress merely intended to protect the "enterprise" completely ignores the legislative attempt to deal with what it found to be a growing and pervasive problem in American society.***

Parness' reliance on the labor law cases *e.g., Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1958) is misplaced. Those cases deal with circumstances involving almost exclusively foreign elements (foreign ship, foreign sea-

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* The remedies provided by 18 U.S.C. §§ 1963 and 1964 which, *inter alia* allow the restoration of business interests to a defrauded victim clearly illustrates the Congressional concern for individual businessmen.

** "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy . . . (2) . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business . . . (4) organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce. . ." Pub. L. No. 91-452, Section 1 (1970) (as set forth in a note to 18 U.S.C.A. § 1961).

*** Consistent with the Congressional intent that the Organized Crime Control Act of 1970 ". . . shall be liberally construed to effectuate its remedial purposes." Publ. L. No. 91-452, Section 904 (set forth as a note of 18 U.S.C.A. § 1961), (1970) "enterprise" is broadly defined as including ". . . *any* individual, partnership, corporation or association or other legal entity. . . ." 18 U.S.C. § 1961(4) (emphasis added).

men, foreign contracts) with incidental American contact (docking in American port).*

In an analogous area, federal anti-trust legislation has been held to apply to schemes planned in the United States and executed in a foreign country where there will be an affect on American commerce.** *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951), cited with approval in *Vanity Fair Mills, Inc.* v. *The T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956).

In another analogous area, Title 18, United States Code, Section 2314 has been applied under circumstances where foreign securities were stolen in a foreign country and then transported to the United States. *United States* v. *Greco*, 298 F.2d 247, 251 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962). See, *United States* v. *Braverman*, 376 F.2d 249 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967).

Based upon the legislative history and the obvious affect Parness' activities had on American commerce and business, it is clear that Congress did not intend to limit the definition of "enterprise" to domestic corporations. Parness was properly charged in Count One with violating Title 18, United States Code, Section 1962(b).

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* Contrary to appellant's contention, these cases support the application of Section 1962(b) to Parness. In *Benz*, the Court examined the legislative history to determine whether Congress intended to protect the foreign seamen. Applying the same test to Parness, *i.e.*, what did Congress intend, it is clear that Congress intended to proscribe his activities and thus limit the avenues of investment open to organized crime. See, *International Longshoremen's Local 1416* v. *Andriadne Shipping Co.*, 397 U.S. 195 (1970) (distinguishing *Benz*).

** Congress intended the Organized Crime Control Act to be interpreted and based, in part, on anti-trust precedent. See, e.g., 116 Cong. Rec., Part 26, p. 35201 (Oct. 6, 1970). See Appellant's Brief, p. 27 (hereinafter cited as "Ap."); see also, *King* v. *Vesco*, 342 F. Supp. 120 (N.D. Calif. 1972) (venue issue under the Act decided by reference to antitrust law).

POINT II

The phrases "Racketeering Activity" and "Pattern of Racketeering Activity" in Section 1962(b) are not unconstitutionally vague.

(A) Racketeering Activity

Parness claims that the term "racketeering activity", defined for purposes of the instant case as any act "indictable" under Title 18, United States Code, Section 2314, is unconstitutionally vague.* He argues that because he did not know with certainty whether a grand jury would have indicted him for the violations of 18 U.S.C. § 2314 which form the predicate for his present conviction, he was given constitutionally insufficient notice that his acquisition of Hotel Corp. would violate 18 U.S.C. § 1962(b). This claim is utterly without merit.

The Supreme Court has held that a statute meets the Constitutional standard of notice if it gives ". . . sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). A statute which requires men of common intelligence to guess at its meaning fails to give the requisite notice. *Conally* v. *General Construction Company,* 269 U.S. 385, 391 (1926). Section 1962(b) meets the test of *Petrillo, supra.* In it Congress has delineated a crime with three elements which as applied in the present case are: two "indictable" violations of 18 U.S.C. § 2314 and the take-over of an enterprise.

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* Section 1961(1) defines racketeering activity as ". . . (A) any act or threat involving . . . (specifically enumerated crimes) . . . which is chargeable under state law" . . . or (B) any act which is indictable under . . . (enumerated statutes including 18 U.S.C. § 2314)."

Parness makes no claim that Section 2314 itself is vague or unclear. Nor does he appear to contest the constitutional propriety of a federal criminal statute's punishing an act, which is already punishable under some other provision of law, when it is carried out in a specific manner or for a specific purpose. For example, under the Travel Act (18 U.S.C. § 1952) activities which violate, *inter alia*, state or federal extortion, bribery, arson, gambling or narcotics statutes may be separately punished where they are carried out with the assistance of the facilities of interstate or foreign commerce. (Wyatt, *J.*); *Bass* v. *United States*, 324 F.2d 168 (8th Cir. 1963); *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (9th Cir. 1963); *United States* v. *Barrow*, 363 F.2d 62 (3d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *Spinelli* v. *United States*, 382 F.2d 871, 887 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969). Similarly the unlawful carrying of a weapon in violation of state or federal law is separately punishable under federal when occurring during the commission of a federal felony—itself separately punishable. 18 U.S.C. § 924(c)(2). *United States* v. *Ramirez*, 482 F.2d 807, 813-14 (2d Cir. 1973).

Instead, Parness' first assertion of unconstitutional vagueness in Section 1962(b) is based on the definition of racketeering activity under 18 U.S.C. § 1961(1). His frail proposition is that the phrase "any act which is indictable under (18 U.S.C. § 2314)" incorporates a fatal lack of warning to potential violators which would not be present had the statute been drafted to read "any act which violates (18 U.S.C. § 2314)." How the use of the word "indictable" so destroys the notice of risk of criminality is an utter mystery. That a different grand jury or prosecutor might not choose to indict for the predicate crime standing alone has absolutely no bearing on whether a potential violator is, under the language of the incorporating statute, adequately warned of the risk.

The identical problem exists under 18 U.S.C. §§ 1952 and 924(c)(2) discussed above which do not employ the word "indictable" in referring to the predicate crime. Under those statutes the potential violator has no certainty as to whether a grand jury would charge him with the predicate crimes standing alone or whether if tried for them separately, he would be convicted. Thus Parness' true complaint would appear to be directed not so much at any vagueness in the word "indictable" as at an inability to attack the predicate crime in a separate, prior proceeding. It is clear, however, that the predicate crime need not be proven or even charged prior to an indictment being brought for a crime incorporating the predicate crime as an element. *United States* v. *Ramirez, supra.* Indeed, one obvious purpose of the phrase "act which is indictable" in the Section 1961(1) definition of racketeering activity is to emphasize that the predicate crimes need not previously have been the subject of an indictment or conviction.*

(B) Pattern of Racketeering Activity

Parness also claims that the statutory phrase "pattern of racketeering" is unconstitutionally vague because as applied to the present case, two indictable acts under Section 2314 could mean (a) two separate schemes to defraud in violation of Section 2314 or (b) two separate acts pursuant to one scheme. This claim is frivolous.

The pattern of racketeering activity by which an enterprise may be acquired in violation of 18 U.S.C. § 1962(b) may encompass many generic categories of crime. Section 1961(1) enumerates the applicable criminal acts and even a casual perusal shows that they include murder, kidnapping, and extortion as well as various kinds of fraud. Thus, if a business enterprise is illegally acquired by threatening

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* Of course, as Judge Bonsal instructed the jury, the elements of the predicate crimes must be established at trial beyond a reasonable doubt.

the owner with death on two separate occasions, it is clear that Section 1962(b) would be violated. Similarly, if the plan to take over the business is based on acts of fraud rather than acts of violence, each separately indictable fraudulent act could serve as one of the two required indictable acts constituting the pattern of racketeering.

In the present case, Hotel Corp. was illegally taken over by Parness pursuant to a pattern of fraudulent acts many of which were separately indictable as crimes. Three specific fraudulent acts within the meaning of two separate paragraphs of 18 U.S.C. § 2314 were properly found by the jury to have been committed and thus the statutorily required pattern was established. The fact that one of these three crimes, Count 5, independently required that the induced interstate travel by Goberman have been pursuant to a "scheme to defraud" and the fact that this "scheme to defraud" may on the facts of the case have been synonymous with Parness' plan to take over Hotel Corp. does not change the clear meaning of the statute or the validity of the jury's verdict.* The two interstate transportations of cashier's checks and the interstate travel by Goberman were all indictable acts capable of supporting the conviction on Count 1.

While appellants denigrate these crimes as being merely jurisdictional violations, they concede that similar individual

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* The court's charge to the jury that the "crucial" element of Count 1 was the devising of a scheme to defraud was, if anything, helpful to the defendants since it required as to that count the finding of an element ("scheme to defraud") which technically was only required under Count 5. The court thus made less likely a conviction on Count 1 in the event of an acquittal on Count 5 even had there still been convictions on Counts 4 and 6. In any event, no objection was made to this portion of the charge and in fact defense counsel endorsed it at the pre-charge conference (Tr. 1332). Indeed, defense counsel adopted the court's theory in summation (Tr. 1560).

acts are separately punishable crimes under both the mail fraud and wire fraud statutes (App. 48).* They do not mention that in defining patterns of racketeering, 18 U.S.C. § 1961(1) specifically permits violations of both the mail fraud and wire fraud statutes to serve as predicates for convictions under 18 U.S.C. § 1962(b). There is no suggestion in either the language of that statute or its legislative history that two separate mail fraud "schemes" rather than mailings must be present to satisfy the requirements of 18 U.S.C. § 1962(b).** Indeed, how often an illegal plan to take over a single business venture could rest on two separately indictable mail fraud or other "schemes" is far from clear. Thus the inclusion of mail fraud and other fraud statutes such as 18 U.S.C. § 2314 in the definition of racketeering activity gives dramatic and clear warning to the individual who would illegally acquire a business enterprise by fraud just as it does to one who would do so by violence. In short, the predicate convictions on Counts 4, 5, and 6 are constitutionally clear and proper foundations for the racketeering conviction on Count 1.

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* It should also be noted that under the Travel Act (18 U.S.C. § 1952), each separate act of interstate travel is a separately punishable crime even though committed in pursuance of a single unlawful gambling business. *United States* v. *Zizzo*, 338 F.2d 577, 580 (7th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

** The Senate Report recommending passage of the Act states: ". . . The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship which combines to produce a pattern*". S. Rep. 91-617, 91st Cong., 1st Sess., p. 158 (1969). See also, 116 Cong. Rec. Part 26, p. 35193 (Oct. 6, 1970) (emphasis added).

POINT III

The evidence was more than sufficient to support the convictions of defendants.

Both appellants claim that the evidence was insufficient as a matter of law to support their convictions. Their principal contention is that there was insufficient proof that the money which Parness and Landew caused to be loaned to Goberman to pay off his debt to Holzer was stolen or converted. Thus they argue that no violations of 18 U.S.C. § 2314 were established either independently (Counts 4 and 6) or as predicates for the conviction under 18 U.S.C. § 1962 (b) (Count 1). The argument simply ignores the ample circumstantial evidence from which a jury could reasonably find the requisite theft or conversion.*

Goberman testified that at the time he was forced to borrow money from Parness' nominees to repay Holzer, approximately $400,000 was owed to Hotel Corp. from gamblers' debts which were either uncollected or collected and not remitted (Tr. 460-63, 701). This amount was over and above the substantial sums which had previously been remitted to Hotel Corp.** Of the outstanding debts, approxi-

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* It should be noted that proof of such theft or conversion was not required to convict on Count 5.

** That Goberman was unable to obtain access to this remitted money is clear. First, he said he could not obtain access to it (Tr. 102). Second, had he been able to obtain these monies, he need not have borrowed from Landew and Amsterdam, pledging his entire stock interest in Hotel Corp. in return. The argument that this factual contention constituted a new theory of the case which fatally varied from the indictment (Ap. p. 56) is simply incredible. Under the paragraph of 18 U.S.C. § 2314 forming the basis for the charges in Counts 4 and 6, the government was required to prove and did prove the

[Footnote continued on following page]

mately 10 percent would, based on prior experience, prove uncollectible. Thus, as the exclusive collector of Hotel Corp.'s outstanding gambling accounts receivable, Parness was situated in a position in which he could have stolen or converted over $350,000.

Having thus established Parness' capacity to have stolen or converted the $160,000 which he loaned to Goberman, the Government then showed by overwhelming circumstantial evidence that that is precisely what Parness did. First, the proof showed that Olympic, the corporate vehicle for Parness' loan to Goberman, derived its income solely from junket money and marker collections. That the $160,000 came from the latter category could be reasonably concluded from the incredible web of deceit which was spun to hide the source:

(1) The $56,000 and $5,000 checks used to help purchase the cashier's checks for transfer to Goberman were drawn on the Olympic account but falsely entered in Olympic's books as payments for air fares (811-12, 851-854; GX 155). Only after the Government's investigation had begun did Parness disclose to his accountant that those monies were loaned to Goberman (Tr. 812, 830-833).

In addition there was evidence from which the jury could have concluded that the $99,000 in small denominations which Landew brought to the New Jersey bank also came from marker collections by Parness (Tr. 702). The Holzer loan became due at a time when Parness expected to have $155,000 in cash available. The $155,000 would have been

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converted quality of the $160,000 loaned by Parness to Goberman. While evidence of Goberman's inability otherwise to obtain that amount of money from Hotel Corp. out of the remittances made by Parness was probative of the fraudulent scheme alleged in Count 5, the government did not allege and need not have proved that those remittances were in any way converted in order to prove the substantive violations of 18 U.S.C. § 2314 charged in Counts 4 and 6.

made up from the $99,000 cash on hand plus $60,000 in cash from anticipated marker collections from a gambler named Norber (Tr. 530-33). Unfortunately for Parness, the $60,000 was seized by the Internal Revenue Service before its delivery to Parness. In all probability it was this untimely seizure that forced Parness to use the telltale Olympic account to supply the balance of the money to be loaned to Goberman.

(2) Barbara Landew testified in the Grand Jury that she had received from Parness $150,000 in cash supplied by Levrey for the loan to Goberman (Tr. 870). This was proven to be false by (a) the $56,000 Olympic check which she herself had transported to the bank in New Jersey to obtain the cashier's checks (Tr. 704-5); (b) the bank officer who recalled the $56,000 check (Tr. 704-5); and (c) Levrey's testimony which denied supplying any such money.*

In addition to her false testimony before the Grand Jury, as to both the source and the form of the money used to purchase the cashier's checks, the evidence that Landew aided and abetted Parness in connection with the crimes charged in Counts 4, 5, 6 was abundant. She allowed her name to be used as one of the purported lenders. She actively participated in the mechanics of transferring the funds loaned to Goberman and even kept the $99,000 cash under her pillow at one point (Tr. 705). She also fully participated in the preparation of the phoney documentation

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* The only evidence of an "investment" on Levrey's part was an agreement to pay Parness $100,000 out of future earnings for a partnership in Hotel Corp. This written agreement was executed after the federal investigation commenced, although Levrey testified it had been an oral agreement before that, and was reduced to writing because he wanted his debts in order in the event of his death.

Interestingly, Levrey had been offered the position of managing director of Hotel Corp. by Parness as early as February 1, 1971 (Tr. 1392) even before Goberman had finally defaulted on the Holzer loan, thus tending to confirm that Goberman had lost de facto control of Hotel Corp. even before he was divested of his stock interest.

used to legally separate Goberman from his stock. The totality of this evidence was more than sufficient to support her conviction as an aider and abettor. *United States* v. *Infanti*, 474 F.2d 522, 526-27 (2d Cir. 1973); *United States* v. *Lacey*, 459 F.2d 86 (2d Cir. 1972).

(3) Parness took elaborate precautions to keep his name detached from (a) the loan to Goberman,* (b) the seven letters divesting Goberman of his pledged stock,** and (c) the shell corporations (Aliter and Terrasol) used to route Goberman's stock toward resale in Canada.***

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* Parness claims that the witness Stone explained Parness' legitimate reason for using strawmen—to keep the customers of the casino from learning that Parness owned it. This was contradicted by Faigin's testimony who said that nominees were used because it was easier to transfer Goberman's shares that way. That part of Faigin's testimony was further contradicted by Stone who said using nominees complicated the transaction. From all of this the jury could have concluded that Parness was keeping his name off the records for a wholly different reason—if anyone, especially Goberman, realized that Parness was the source of the funds for the loan to Goberman he might well have asked where the money had come from.

** The letters state that Landew and Amsterdam were at all times acting for Aliter Corp. in connection with the loan to Goberman and Aliter's subsequent acquisition of Hotel Corp's. shares. This was a remarkable claim since Aliter was not even in existence when Landew and Amsterdam made and called the loan to Goberman. Faigin testified on direct that the letters had been reviewed by Goberman and his counsel. On cross-examination Faigin admitted that it was Parness who paid Goberman's counsel through Faigin.

*** Klavir, Parness' associate, had asked the accountant who was paid by Parness to prepare a consolidated financial statement for the prospectus to be filed in Canada. The accountant refused. When the prospectus was filed it contained such a financial statement with a forged certification of the accountant. When the accountant learned of this and complained to Parness, Faigin attempted to get the accountant to withdraw his forgery charges. The accountant refused and the offering was withdrawn. This

[Footnote continued on following page]

(4) Parness attempted to get a witness to alter his testimony. *United States* v. *Freundlich*, 95 F.2d 376, 378-79 (2d Cir. 1938). Parness had frequently signed documents at Olympic in the name of Edward Feldman. After the investigation of this case had begun, the real Edward Feldman had expressed surprise in learning that Parness had done this. Thereafter Parness attempted to get Feldman to change his story and to execute false documents. Parness also tried unsuccessfully to get Feldman to testify at trial that he had given Parness permission to use his name (Tr. 682-89).*

(5) There was a total absence of any credible explanation by Parness as to the source of the monies loaned to Goberman. As this Court has recently stated:

> ". . . To be sure, the defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the

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episode fully corroborated Goberman's testimony that he had overheard Parness and Klavir discuss a deceptive Canadian stock offering in connection with Hotel Corp.'s stock and the jury could have concluded that Parness was responsible for the forged certification as part of his over all scheme to unload the fraudulently acquired Hotel Corp. stock.

* Feldman was vigorously cross-examined at trial by Mr. Cohn, Parness' attorney, who had previously represented Feldman at the time he appeared before the Grand Jury investigating this matter. With dubious propriety Mr. Cohn cross-examined Feldman with respect to their prior attorney-client conferences. Although not disclosed to the jury, Feldman had pleaded guilty prior to trial to committing perjury in the Grand Jury (Tr. 682-88).

> prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version. . . ."

United States v. *Frank,* slip op. 1883, 1896-97, — F.2d — (2d Cir., February 25, 1974).

POINT IV

The prosecutor's summation was proper in all respects.

Defendants claim that in summation the prosecutor improperly commented on defendants' failure to testify, and improperly interjected his personal belief in defendants' guilt.* These claims are without merit.

The prosecutor stated to the jury in summation that the defendants had not produced the person who allegedly put up the money which Parness had loaned to Goberman and thus had not refuted the government's circumstantial proof that that money had been acquired by Parness by diverting marker collections. This Court has consistently held that the prosecution may comment on a defendant's failure to call witnesses to support the defense theory or contradict the prosecution's case. The information called for by the prosecutor was not in the sole possession of defendants and therefore was not a comment on *their* failure to testify. *United States* v. *Dioguardi,* slip op. 1163, 1183, — F.2d — (2d Cir. January 4, 1974); *United States* v. *Lipton,* 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied,* 410 U.S. 927 (1973) and numerous cases cited therein; see *United States* v. *Projansky,* 465 F.2d 123, 138 (2d Cir.), *cert. denied,* 409 U.S. 1006 (1972).

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* There was no objection below on this point.

The prosecutor's statement in summation that ". . . they don't tell you exactly what the truth was" was proper. A reading of that portion of the summation reveals that this was a comment on the entire defense case and not on defendants' failure to testify. Under the circumstances of this case, where Barbara Landew's false Grand Jury testimony had been read to the jury and Milton Parness' false statements were in evidence through other witnesses, the summation was fair comment on the entire defense case. See, *Lipton, supra.*

Parness' final claim, that the prosecutor interjected his personal beliefs into the record, is frivolous. The prosecutor did not state his personal belief or disbelief.* The language of summation of both defense and prosecution counsel was strong—a fitting culmination to this long and hotly contested trial. See *United States* v. *LaSorsa,* 480 F.2d 522, 526 (2d Cir.), *cert. denied,* 42 U.S.L.W. 3197 (Oct. 9, 1973); *United States* v. *Bentes,* 457 F.2d 1114, 1178 (2d Cir.), *cert. denied,* 409 U.S. 842 (1972).

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* It should be noted that during the direct examination by Mr. McGuire, Ida Cohen, who acted as a parttime bookkeeper for Olympic, and who was Landew's aunt, testified as follows:

> Q. ". . . By the way, you have met Mr. Cohn before, haven't you? A. Yes, I have."

Based upon this question and answer defense counsel made the following statement in his summation:

> "Ladies and Gentlemen, I have said enough, maybe too much. I've got a big responsibility here. I don't get to try too many criminal cases. Why I am trying this one is not appropriate for me to discuss. Mr. McGuire [the prosecutor] brought out a little of it when he questioned *Aunt Ida* and developed the fact that I knew her. Whether I know her or how well is not why I am here . . ." (Tr. 1634) (emphasis added).

Such injections of personal credibility and motivation by defense counsel have been strongly criticized by this court. *United States* v. *De Angelis,* slip op. 1447, 1458-62, — F.2d — (2d Cir. January 25, 1974) (concurring opinion of Mansfield, *CJ.*). In the present case defense counsel went even further and asserted what may well have been a false kinship with a witness.

POINT V

The motion for a new trial based upon newly discovered evidence and the suppression of exculpatory evidence was properly denied by the District Court without a hearing.

After trial defendants claimed unsuccessfully that the alleged shift in prosecution theory (see Point III, *supra*) made relevant certain evidence which was not sought until after trial because of reliance on the original Government theory of prosecution. Since the argument rests on the faulty premise that there was a shift in theory, the claim is without merit.

In addition, even if there had been a shift in theory the alleged newly discovered evidence does not establish appellant's contention that Goberman did not advance the proceeds of the Holzer loan to Hotel Corp. The Government introduced documentary evidence consisting of copies of checks and debit memoranda from Goberman's personal checking account, supporting the claim that Goberman advanced funds to Hotel Corp. in 1970 (GX 23). Hotel Corp.'s bank records reflected the receipt of one of the checks and two debit memoranda totalling $95,000. An additional check for $40,000 was drawn to the order of Hotel Corp. Defendants claim that the newly discovered evidence establishes that the $40,000 check was not credited to Hotel Corp.'s bank account. The Government never alleged that it did go into the account. The check could have been cashed and the cash made available to Hotel Corp.* This evidence does not disturb the basic proposition that almost all of the $150,000 loaned by Holzer to Goberman went to Hotel Corp. Moreover, even if it had not, that would not prove that Goberman, as the record owner of 90 percent of Hotel

* Defense witness Blandino testified that checks payable to Hotel Corp. were often cashed and not deposited (Tr. 1036-39).

Corp.'s stock, could not in fact have borrowed money from Hotel Corp. if he had not been denied access to Hotel Corp.'s funds.

Defendants claim that other newly discovered evidence impeaches Goberman's testimony on direct examination that he had lost control of Hotel Corp.'s bank accounts. This new evidence consists of three checks written by Goberman on the account of Hotel Corp. and a mortgage deed signed by Goberman as managing director of Hotel Corp. An examination of the checks reveals that unlike GX 23 (Tr. 49), the new checks do not bear a "PAID" stamp, thus corroborating Goberman's testimony that he was unable to withdraw money from the account. Defendants fail to explain the relevance of the mortgage deed except as possible impeachment material supporting an inference that Goberman was more than the nominal managing director which the Government claimed he had become by the time that Holzer began to insist on repayment of his loan.

Thus the evidence does not meet well established criteria for "newly discovered evidence" requiring a new trial. Not only could the evidence have been deemed relevant and discovred with due diligence by defense counsel prior to trial, it is merely impeaching at best and therefore cumulative. Nor would it probably produce an acquittal at a new trial. *United States* v. *Costello,* 255 F.2d 876 (2d Cir.), *cert. denied,* 357 U.S. 937, *reh. denied,* 358 U.S. 858 (1958); *United States* v. *Polisi,* 416 F.2d 573 (2d Cir. 1969).

Defendants also claim that if the Government had knowledge that Goberman's name was listed as a signatory on Hotel Corp.'s account there was an obligation to reveal that fact pursuant to *Brady* v. *Maryland,* 373 U.S. 83 (1963), and the failure to do so requires a new trial. The records enumerated by defendants in their brief were not in the possession of the Government at the time of trial nor were they made available to the Government prior to or at the time of

trial.* Moreover, the records in question were clearly within the control of, or at least accessible to, the defense and thus are not within the *Brady* rule at all. *United States* v. *Ruggiero,* 472 F.2d 599, 604-05 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

POINT VI

The markers were properly excluded.

Defendants claim that the Court erroneously excluded certain orginal markers which would have supported the inference that not all the money that Goberman testified to as being owed to Hotel Corp. was actually collected by Parness. The claim is without substance.

It is clear that the Court properly excluded the markers represented by DX, R, V, W and Y because the witness Blandino was unable to lay a proper foundation for their admission. He was not able to identify the signatures of the gamblers nor was he able to state that the purported gamblers lost money at the casino. See, Wigmore, *Evidence* § 2130 (3 ed. 1940). With respect to the remaining markers Blandino also failed to lay a proper foundation for a different reason. He was not able to state when the markers were executed and whether or not they represented a true debt to Hotel Corp.** This failure was significant because there was considerable doubt as to the legitimacy of the markers and the signatures on them. The proffered markers could have been manufactured for trial. In any event, the existence of uncollected markers, if that is what they

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* An affidavit to this effect was submitted by the Government to the District Court. The defense affidavit submitted to the District Court by Milton Schwartz (the person with presumed first hand knowledge), failed even to identify the records to which Mr. Cohn subsequently claimed the Government had access.

** A foundation could have properly been laid had defendants called the purported gamblers.

were, did not contradict the Government's proof that other markers had been collected by Parness and diverted to his own use.

Moreover, the claim of error is unavailing for another reason. Defense counsel disregarded the Court's ruling below and argued to the jury the existence of these uncollected markers and the inference he sought to draw from them (Tr. 1519, 1620, 1627, 1634). Consequently, there was no prejudice to defendants even if the markers were improperly excluded.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

BART M. SCHWARTZ,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.